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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. NICKY RAYLEE VASQUEZ, Defendant and Appellant.	E047613 (Super.Ct.No. RIF133965) OPINION

APPEAL from the Superior Court of Riverside County. Robert E. Law, Judge. (Retired judge of the former Orange Mun. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Nicky Raylee Vasquez guilty of attempted voluntary manslaughter (Pen. Code, §§ 664, 192),[1] a lesser included offense of attempted murder (§§ 664, 187, subd. (a)) (count 1); assault with a deadly weapon, to wit, a knife (§ 245, subd. (a)(1)) (count 2); and street terrorism (§ 186.22, subd. (a)) (count 3). The jury also found true that defendant used a deadly weapon when he committed the manslaughter (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23)), and that defendant inflicted great bodily injury in the commission of counts 1 and 2 (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8)).[2] Defendant was sentenced to a total term of seven years eight months in state prison. Defendant's sole contention on appeal is that his conviction for count 3 must be reversed because the use of ex parte testimonial statements obtained by the People's investigator violated his Sixth Amendment right to confrontation. We reject this contention and affirm the judgment.

I

FACTUAL BACKGROUND

On December 10, 2006, defendant and the victim were attending a birthday party at a house in Riverside. Sometime during the evening, defendant and the victim walked out into the middle of the street, took off their shirts, and "squar[ed] off." A crowd surrounded the two while they argued and fought. The two physically engaged each

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The jury found the gang enhancement allegations (§ 186.22, subd. (b)) attached to counts 1 and 2 not true.

other and eventually ended up falling into a neighbor's yard on their grass. The fight subsided at one point, but then resumed. During the brawl, the victim was stabbed 10 times with a knife or "homemade shank." The victim spent about 18 days in the hospital and suffered a punctured and collapsed lung.

Defendant and his five associates were dressed in gangster-type attire. After the fight, defendant was seen throwing gang signs and was heard yelling "'CB,'" referring to a Casa Blanca gang. Witnesses in the case, as well as the victim, feared for their and their families' safety and believed defendant's gang may retaliate against them if they testified or spoke to the police.

Defendant was eventually arrested. During a valid custodial interrogation, defendant admitted to stabbing the victim, but claimed to do so because the victim was choking him. He also admitted associating with the Casa Blanca Evans Street gang, but denied flashing any gang signs or yelling a gang name during the fight. He was found to have a belt buckle and cigarette lighter with the initials of his gang on them. Photographs were also discovered with defendant and his fellow gang members displaying their gang hand signs. In addition, defendant continued to obtain common Casa Blanca gang-related tattoos while in custody.

Riverside Police Detective Simons testified as a gang expert. Relying on his own vast personal experience and knowledge, statements made by defendant, the victim, and witnesses, and information obtained from other officers, Detective Simons concluded that defendant was an active gang member and committed the offenses for the benefit of the Casa Blanca Evans Street gang.

II

DISCUSSION

Defendant urges, under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*) and *Melendez-Diaz v. Massachusetts* (2009) ___ U.S. ___ [129 S.Ct. 2527, 174 L.Ed.2d 314] (*Melendez-Diaz*), that the admission of Detective Simons's gang expert testimony violated his Sixth Amendment right to confront and cross-examine the witnesses against him because, in addition to relying on his own personal experience, Detective Simons relied on information obtained from other officers in rendering his expert opinion.

Initially, we note defendant forfeited this present contention by failing to object below on the ground now challenged. (*People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1220.) Admittedly, as defendant points out, trial counsel filed a motion to exclude the admission of gang expert testimony on the grounds of prejudice, hearsay, profile, and reliability. The trial court denied the motion. However, defendant did not complain that the admission of the challenged evidence violated his right to confrontation. Additionally, we also acknowledge that the contemporaneous objection requirement may be excused "'when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change.'" (*People v. Black* (2007) 41 Cal.4th 799, 810.) However, *Crawford* itself was decided about four years before the trial in this case. Defendant cites no later case holding that *Crawford* does, in fact, apply to gang expert statements. Thus, he has not shown any unforeseeable change in the law.

In any event, assuming defendant did not waive this issue on appeal, we find it unmeritorious. Indeed, as defendant concedes, this court's opinion in *People v. Thomas* (2005) 130 Cal.App.4th 1202 [Fourth Dist., Div. Two] (*Thomas*) is on point.[3] There, this court held that *Crawford* did not bar the admission of an expert's testimony that other gang members had stated the defendant was a gang member. (*Thomas*, at pp. 1208-1210.) *Thomas* requires us to reject defendant's present contention.

The Sixth Amendment guarantees a defendant's right "to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) The United States Supreme Court has held that "out-of-court statements that are testimonial in nature are inadmissible unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant." (*Thomas, supra,* 130 Cal.App.4th at p. 1208.)

However, as this court explained in *Thomas*, "*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and, additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion." (*Thomas, supra*, 130 Cal.App.4th at p. 1210.) Moreover, *Crawford* itself explicitly states the confrontation clause "does not bar the use of testimonial statements

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[3] Defendant recognizes "this [c]ourt's prior adverse ruling on this issue," "but requests that this [c]ourt revisit the issue." We decline defendant's invitation.

for purposes other than establishing the truth of the matter asserted." (*Crawford, supra,* 541 U.S. at p. 59, fn. 9.)

Furthermore, "[t]he rule is long established in California that experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions. Such sources may include hearsay." (*Thomas*, *supra*, 130 Cal.App.4th at p. 1209.) "Expert testimony may also be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.)

Defendant's reliance on the United States Supreme Court decision in *Melendez-Diaz, supra,* 129 S.Ct. 2527 is misplaced. We conclude *Melendez-Diaz* is inapposite to our analysis of this case and does not change our reasoning as stated in *Thomas*.

In *Melendez-Diaz*, prosecutors sought to introduce evidence of three "certificates of analysis" from scientists at the Massachusetts Department of Public Health that a substance seized from the defendant was cocaine. (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2530-2531.) The defendant argued the confrontation clause required the prosecution to put the scientist who created the report on the witness stand to testify against him. (*Id*. at p. 2531.) The United States Supreme Court agreed, holding that the certificates were "testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "'be confronted with"' the analysts at trial." (*Id*. at p. 2532.)

Melendez-Diaz lends no support to defendant's contention here. The report in *Melendez-Diaz* was offered to prove the information contained in the report was true—that the substance tested was in fact cocaine. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2547.) Here, Detective Simons's use of other officers' field interviews, which contained testimonial hearsay, was not offered to prove the truth of the matter. The field interviews were used by Detective Simons in forming his expert opinion. Defendant had, and seized, the opportunity to cross-examine Detective Simons about how his opinion was formed and his qualifications for forming such an opinion. Thus, *Melendez-Diaz* does not undermine *Thomas* with respect to an expert's reliance on hearsay in forming an opinion.

Indeed, after *Melendez-Diaz*, experts may still testify to their opinions on relevant matters and relate the information and sources—including hearsay sources—upon which they rely in forming those opinions. Experts are subject to cross-examination about their opinions and, additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents—they only go to the weight of the expert's opinion. (*Thomas*, *supra*, 130 Cal.App.4th at p. 1210.) As a matter of stare decisis, we must follow our opinion in *Thomas* that an expert can base his or her opinion on testimonial hearsay. Thus, we conclude that Detective Simons's testimony did not infringe upon defendant's Sixth Amendment right to confront the witnesses against him.

The failure to establish prejudice also shows that any alleged error was harmless. Even if defendant did not have the opportunity to cross-examine the other officers, he was able to fully cross-examine Detective Simons, who had also conducted the

investigation. Furthermore, defendant admitted that he associated with the Casa Blanca Evans Street gang. The witnesses and the victim believed defendant had thrown gang signs after the fight, and they also heard defendant yell defendant's gang name. The witnesses and the victim feared for their safety, and they believed defendant's gang may retaliate against them. Moreover, defendant was found to have a belt buckle and cigarette lighter with the initials of his gang on them. Photographs were also discovered with defendant and his fellow gang members displaying gang hand signs. Defendant continued to obtain common Casa Blanca gang-related tattoos while in custody. Moreover, a review of Detective Simons's testimony shows that he relied mainly on his own personal experience, investigation, and observations in forming his opinion. Most telling was that defendant essentially conceded the street terrorism charge during closing argument.[4] Defendant is unable to demonstrate prejudice, under any standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] [harmless beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [no reasonable probability the error affected the result].)

[4] Specifically, defense counsel stated, "Now, let's talk about what are non-issues. These things are non-issues. You need not consider them. Whether or not [the victim] was stabbed? Yes, he was. Who stabbed [the victim]? [Defendant] did. Is [defendant] a member of Casa Blanca gang? He is. Is Casa Blanca a criminal street gang as defined in the Penal Code, . . . Yes, [it] is. Does [defendant] hang out with other Casa Blanca gang members? Yes, he does. We saw pictures of them."

III

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.